आयकर अपीलीय अधिकरण नागपुर न्यायपीठ, नागपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL NAGPUR BENCH, NAGPUR

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.132/NAG/2018
निर्धारण वर्ष / Assessment Year : 2013–14

M/s. Eureka Medicare Private Limited,
C/o. Sanjeevan Hospital
Yavatmal Ratanlal Plot,
Mahadeo Mandir Road,
Near Postal Ground, Yavatmal-445001.

PAN : AABCE6829M .....अपीलार्थी / Appellant

बनाम / V/s.

Pr. CIT-2,
Nagpur. .....प्रत्यर्थी / Respondent

Assessee by : Shri K. P. Dewani, Adv.
Revenue by : Shri U. U. Kasar, Jt. CIT

सुनवाई की तारीख / Date of Hearing : 28.03.2019
घोषणा की तारीख / Date of Pronouncement : 25.04.2019

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

This appeal is filed by the assessee against the order of Pr. CIT-2, Nagpur dated 29.03.2018 passed u/s 263 of the Act for the Assessment Year 2013-14.

2. The grounds raised by the assessee are as under :-

> *"1. The order passed u/s 263 of I.T. Act 1961 is illegal, invalid and bad in law.*
>
> *2. The order passed u/s 263 holding that assessment framed by A.O. is without making inquiries and is therefore erroneous is unjustified unwarranted and bad in law.*
>
> *3. The order passed u/s 143(3) being after complete examination and verification cannot be termed as erroneous and prejudicial to the interest of revenue.*
>
> *4. The assessee having submitted complete details before Hon'ble CIT, he ought not to have set aside the assessment directing the A.O. to pass a fresh assessment order and verify the admissibility of claim of deduction u/s 80IB(11C) of I.T. Act 1961.*
>
> *5. Any other ground that shall be prayed at the time of hearing."*

3. Briefly stated the relevant facts include that the assessee is a company. The assessee filed the return of income declaring Nil income. During the scrutiny proceedings, the Assessing Officer segregated the ineligible sum of Rs.92,920/- and excluded the same for the purpose of computing allowable deduction u/s 80IB(11C) of the Act. The said sub-section of the Act relates to the allowing of deduction in the case of *"an undertaking deriving profits from the business of operating and maintaining a hospital located anywhere in*

India, other than the excluded area". The Assessing Officer made the said amount as addition to the total income returned by the assessee.

4. Subsequently, the Pr.CIT-2, invoking the provisions of section 263 of the Act, directed the Assessing Officer to pass a fresh assessment stating the following para 6 of his order :-

> *"6. The failure on part of the Assessing Officer to* ***ascertain whether the interest, rental income, referral income and income from running a Nursing college*** *are permissible deductions under section* ***80IB(11C)*** *of the Act has rendered the assessment order erroneous in so far as it is prejudicial to the interest of revenue. The assessment order is therefore set-aside. The Assessing Officer is directed to pass a fresh assessment order after verifying the admissibility of the claim of deduction u/s 80IB(11C) of the Act. Proper opportunity should be provided to the assessee while passing the fresh assessment order."*

5. It is the view of the Pr.CIT that such interest income, rental income, referral income and income from running a Nursing College, were not eligible income for deduction and however, Assessing Officer granted the deduction u/s 80IB(11C) of the Act on such receipts in the assessment order. Hence, the Pr.CIT considered the order of the Assessing Officer as erroneous and prejudicial to the interest of the Revenue.

6. Aggrieved with the said decision of the Pr.CIT, the assessee is in appeal before the Tribunal with the above extracted grounds.

7. At the outset, ld. Counsel for the assessee submitted that, on similar issue, in the assessment year 2012-13, the Pr.CIT, invoking the provisions of section 263 of the Act, cancelled the assessment made in the assessment year 2012-13 on similar grounds. In that case, the assessee was agitated against the revisional order of the Pr.CIT for the assessment year 2012-13 and filed an appeal before the Tribunal. The Tribunal, vide ITA No.153/NAG/2017 order dated 01.08.2018, quashing the revisional order of the Pr.CIT, allowed the appeal of the assessee. The Tribunal, in para 12 of the said decision (supra), held that the various items of receipts mentioned above, questioned by the CIT, are found interconnected to the operating and maintaining of the hospitals. The Tribunal held the Assessing Officer's order is reasonable and assessee is found eligible for deduction u/s 80IB(11C) of the Act in respect of such receipts. In the said decision (supra), the Tribunal referred to the fact of Assessing Officer allowing similar claim in the preceding assessment years too. The Tribunal did not appreciate the allegation that Assessing Officer

did not verify the claim properly. For the sake of completeness, the relevant paras 12 to 16 of the order of the Tribunal (supra) are extracted hereunder :-

> *"12. We find that the above submissions amply explain that the items of receipt mentioned and questioned by the Commissioner of Income Tax are inextricably linked to the operating and maintaining of the hospitals. Even at the cost of repetition, we may add that these activities were found to be inextricably so linked and the assessee was allowed deduction u/s.80IB(11C) in the immediate preceding year.*
>
> *13. Hence, in the background of the aforesaid discussion and precedent, we are of the considered opinion that the Commissioner of Income Tax was not at all justified in assuming jurisdiction u/s. 263 of the act. We hold that there was no material on record to warrant assumption of jurisdiction by the Commissioner of Income Tax. In this regard, we place reliance upon the exposition of Hon'ble jurisdictional High Court in the case of CIT vs. Gabrial India Ltd. [1993] 203 ITR 108 (Bom) for the following:*
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> > *The power of suo motu revision under sub-section (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of revision under this sub-section, viz., (i) the order is erroneous; and (ii) by virtue of the order being erroneous prejudice has been caused to the interests of the revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. One finds that the expressions 'erroneous', 'erroneous assessment' and 'erroneous judgment' have been defined in Black's Law Dictionary. According to the definition, 'erroneous' means 'involving error; deviating from the law'. 'Erroneous assessment' refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, 'erroneous judgment' means 'one rendered according to course and practice of Court, but contrary to law, upon mistaken view of law, or upon erroneous application of*

legal principles'. From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an ITO acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the ITO, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where the ITO while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the ITO. That would not vest the Commissioner with power to re-exmine the accounts and determine the income himself at a higher figure. It is because the ITO has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revison because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed. Therefore, in order to exercise power under section 263(1) there must be material before the Commissioner to consider that the order passed by the ITO was erroneous insofar as it is prejudicial to the interests of the revenue and that it must be an order which is not in accordance with the law or which has been passed by the ITO without making any enquiry in undue haste. An order can be

said to be prejudicial to the interests of the revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power. It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the Court, it would be open to the Courts to examine whether the relevant objectives were available from the records called for and examined by such authority. The ITO in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given a detailed explanation in that regard by a letter in writing. All these were part of the record of the case. Evidently, the claim was allowed by the ITO on being satisfied with the explanation of the assessee. This decision of the ITO could not be held to be 'erroneous' simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the ITO to re-examine the matter. That was not permissible. Hence, the provisions of section 263 were not applicable to the instant case and, therefore, the Commissioner was not justified in setting aside the assessment order.

14. We further find it opt to refer the decision of the Hon'ble Apex Court in the case of Max India Ltd. (supra) for the proposition that where two views are possible and ITO has taken one view which the Commissioner of Income Tax does not agree, it cannot be treated as erroneous order prejudicial to the interest of Revenue.

15. Accordingly, we quash the order passed by the Commissioner of Income Tax u/s.263 of the Income Tax Act, 1961.

16. In the result, this appeal by the assessee stands allowed."

8. The facts are similar to that of the earlier assessment years. The ld. DR did not bring any new facts to our attention. The similar receipts are held as eligible receipts. After hearing both the sides and following the parity of reasoning, we set-aside the order of the Pr.CIT-2. Accordingly, the grounds raised by the assessee are allowed.

9. In the result, the appeal of the assessee is allowed.

Order pronounced on 25th day of April, 2019.

Sd/-	**Sd/-**
(विकास अवस्थी /VIKAS AWASTHY)	**(डी. करुणाकरा राव/D. KARUNAKARA RAO)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

नागपुर / *Nagpur; दिनांक / Dated : 25th April, 2019.*

Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)
4. The CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, नागपुर बेंच, नागपुर / DR, ITAT, Nagpur Bench, Nagpur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, नागपुर / ITAT, Nagpur.